

AN APPELLATE PRIMER:

The ABC's of Appeals, Special Actions, & Post-Conviction Relief

May 4, 2012

Black Canyon Conference Center

Phoenix, Arizona



STATE'S APPEALS

Presented By:

JACOB LINES

Deputy Pima County Attorney
Tucson, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

1951 West Camelback Rd., Suite 202

Phoenix, Arizona 85015

APAAC Appellate Primer
May 4, 2012

State's Appeals
Presented by Jacob R. Lines
Deputy Pima County Attorney
Jacob.Lines@pcao.pima.gov

You have received an unfavorable ruling. What do you do?

I like to start with three questions.

1) Why was the judge wrong?

Specifically identify what the judge ruled, why he or she ruled that way, and why you believe it is incorrect.

Is it a question of fact? For example, did the judge accept the Defendant's version of events rather than the officer's version of event?

Is it a question of law? For example, did the judge interpret a statute or rule and rule against you solely on that basis?

It makes a big difference because of the standard of review that will be employed. We will talk about that later.

2) What facts are necessary for our argument?

For example, for an argument that a piece of evidence was seized legally because it was in plain view, we need facts about the officer being in the place legally and about the evidentiary value of the evidence being immediately apparent.

Other examples?

3) Where are those facts in the record?

What is “the record”? Let’s look at Rule 31.8(a)(1):

The record on appeal to the appellate court shall be a certified transcript, all documents, papers, books and photographs introduced into evidence, and all pleadings and documents in the file – (other than subpoenas and praecipes not specifically designated), and if authorized by the appellate court, an electronic recording of the proceeding.

In other words, the record is the court’s file plus transcripts. So, if the facts that we need for the argument are not in the pleadings or presented in an evidentiary hearing, we have a problem.

TIP: disclosure is not part of the record. If you have an argument about disclosure, make sure you get specifics in the record, either at an evidentiary hearing or in a pleading. Otherwise, you only have lawyers’ arguments in the transcript, and the appeals courts might not find that convincing.

Appeal or Special Action?

Not everything is appealable. By that, I mean that we do not have a right to appeal everything. The State’s right to appeal is strictly limited to constitutional or statutory provisions that clearly grant that right. *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990); *State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 340, 767 P.2d 226, 227 (App. 1989), citing *State v. Lelevier*, 116 Ariz. 37, 567 P.2d 783 (1977).

Our appeals statute is A.R.S. § 13-4032:

An appeal may be taken by the state from:

1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
2. An order granting a new trial.
3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request.

5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.

6. An order granting a motion to suppress the use of evidence.

7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

NOTE: subsection 3, the cross-appeal provision, is not as big as it looks. It only grants a right to appeal if we win at trial and then the defendant appeals. Then, the appeals court is only likely to address your issue if they reverse the conviction and remand. Otherwise, they have no need to address it because you already won at trial and it their decision would have no practical effect.

The takeaway lesson is: if it isn't in the statute, then we can't appeal it. You might think about a special action instead. *See State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App. 2008).

Should we appeal this?

Once you figure out that you can appeal something, the question becomes whether you should appeal it. Here are a few of the factors that prosecutors should consider when deciding whether to appeal:

Any other factors?

Justice

Effect on victims

Availability of resources

Ethics

Likelihood of success

The standard of review

Bad facts/good facts?

Effect on future cases

Picking the right battles

Other alternatives: motions to reconsider, rethink trial strategy
And remember – appellants are supposed to lose appeals.

How to appeal

File a notice of appeal. For a sample, email me. If the case is still pending (e.g., the judge suppressed evidence but the case is still alive), file a motion to dismiss for purposes of appeal, citing *State v. Million*, 120 Ariz. 10, 12-15, 583 P.2d 897, 899-902 (1978). This avoids leaving the defendant, and the case, in trial-court limbo during the appeal and guards against speedy trial claims later.

When to appeal

You must file your notice of appeal “within 20 days after the entry of judgment and sentence,” or, in a cross-appeal, “within 20 days after service of the appellant’s notice of appeal.” Ariz. R. Crim. P. 31.3. This means that you must file your notice within 20 of the order being appealed. A motion for reconsideration does not extend the time for the notice. If your notice of appeal is late, the Court of Appeals has no jurisdiction to hear your appeal. See *State v. Limon*, 229 Ariz. 22, 23, ¶¶ 4-6, 270 P.3d 849, 850 (App. 2011).

TIP: Do you think a motion for reconsideration may work, but worry whether the court will rule in time for you to file a notice of appeal? Try this: file your motion but still file a notice of appeal within your 20 days. Then ask the Court of Appeals to revest jurisdiction in the trial court so it can decide the motion for reconsideration.

What next?

After you file your notice of appeal, file a designation of transcripts within 5 days of your notice. In that designation, list the transcripts that need to be prepared and who the court reporter is for each transcript. Look at Rule 31.8(b)(4) for details. File it in Superior Court and send a copy to the court reporters. From there, the reporters will file the transcripts with the Court of Appeals.

Then what?

When the record is complete, the Court of Appeals will send you an order telling you when your opening brief is due (40 days from the day of that order). Ariz. R. Crim. P. 31.13(a). The appellee will have 40 days to respond, and you will have 20 days to reply. After the briefing is finished, the appeal will be “at issue” and you can start waiting. You can expect to wait for at least a month, usually more, after the briefing is done. In my last 10 appeals, the Court ruled, on average, 2.2 months after the briefing was done.

TIP: for cases involving victims, advise them up front about how long appeals take. Explain the process so they understand why it takes so long.

Your briefs

According to Rule 31.13(c), your opening brief must have the following:

- A table of contents
- A table of citations
- A statement of the case (can be combined with statement of facts)
- A statement of facts (WITH citations to the record)
- A statement of the issues presented for review
- An argument (WITH the proper standard of review and citations to relevant authority)
- A short conclusion stating the precise relief sought.
- An appendix if desired.

Some limited writing advice:

- Remember your audience. It is a panel of dispassionate judges, not a jury.
- Remember your standard of review. This is the question the judges will be asking. In other words, they will not be asking, “Was the State right about this argument?” They will be asking, “Can the State prove from this record that the trial court was wrong to rule like this?”
- Ask for help if you need it.
- Keep it short.

Questions of law, such as interpretation of constitution, statute, or rule, are reviewed de novo. *State v. Nichols*, 224 Ariz. 569, 572, ¶ 12, 233 P.3d 1148, 1151 (App. 2010); *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 7, 210 P.3d 1283, 1285 (App. 2009); *State v. Kelly*, 210 Ariz. 460, 461, ¶ 3, 112 P.3d 682, 683 (App. 2005).

A motion to dismiss is reviewed for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004).

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, 81, ¶ 25, 235 P.3d 227, 234 (2010); *State v. Tucker*, 205 Ariz. 157, 165, 68 P.3d 110, 118 (2003); *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995).

Motions to suppress are reviewed for an abuse of discretion, deferring to the trial court's factual findings but reviewing the legal conclusions de novo. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004).

Findings of fact are upheld unless they are "clearly erroneous." *State v. Burr*, 126 Ariz. 338, 339, 615 P.2d 635, 636 (1980).

After the decision

You get the decision. You win (congratulations!) or you lose (I'm sorry). The next step is a petition for review. Our supreme court is not a court of error. It exists, for the most part, to declare the law. It does not exist to fix every error that may still exist in a case after the Court of Appeals is done. Because of that, a petition for review must explain persuasively why the court should hear the case.

Rule 23(c)(3) of the Arizona Rules of Civil Appellate Procedure explains why petitions may be granted:

the fact that no Arizona decision controls the point of law in question, a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

In other words, if you want to petition for review, you have a difficult job ahead of you. Look back at those same factors you considered in deciding to appeal. Then it is a good idea to ask someone who has been there before (I like emailing the AG's Office). Send an email to APAAC if you would like some additional perspectives.

If you decide to file a petition for review, you have 30 days to do so. Your petition is your chance to explain to the court why the issue in your case is important enough for it to hear. It is not necessarily about the merits of the case, but about the importance of the issue presented. See Rule 23 of the Civil Appellate Rules for details. The appellee will have 30 days to respond. Then, you wait again. Our supreme court takes a couple of months to decide whether to take review of a case. If it accepts review, it will set a time for briefing on the merits and oral argument. If the court declines review, a mandate will issue from the Court of Appeals, sending your case back to the trial court.